No. 06-1038

In the Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
Petitioner,

v.

COMMUNITIES FOR EQUITY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

AMICUS CURIAE BRIEF OF NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS IN SUPPORT OF PETITIONER

WILLIAM E. QUIRK
Counsel of Record
AARON M. HOUSE
SHUGHART, THOMSON & KILROY, P.C.
TWELVE WYANDOTTE PLAZA
120 W. 12TH STREET
KANSAS CITY, MO 64105
(816) 421-3355

Attorneys for Amicus Curiae National Federation of State High School Associations

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

CONCLUSION 6

TABLE OF AUTHORITIES

CASES

Page(s)

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985) 5

Communities for Equity v. Michigan High School Athletic Ass'n,
459 F.3d 676 (6th Cir. 2006) 3

Craig v. Boren,
429 U.S. 190 (1976) 6

United States v. Virginia,
518 U.S. 515 (1996) 2-6

RULES

Supreme Court Rule 37 1

STATEMENT OF INTEREST[1]

The National Federation of State High School Associations ("NFHS") is the national service and administrative organization of high school athletics. Founded in 1920, the NFHS is composed of one high school athletic association in each of the fifty states and the District of Columbia. The NFHS's membership, in turn, provides membership for approximately 90 percent of the high schools in the United States.

The NFHS's mission is to provide leadership and national coordination for the administration of interscholastic athletics. The NFHS works to enhance the educational experiences of high school students and to reduce the risks to them of participating in interscholastic athletic programs. The NFHS strives to promote participation and sportsmanship, to develop good citizens through activities that provide equitable opportunities, and to maximize the achievement of educational goals. The NFHS exists to protect and promote the best interests of high school boys and girls.

---

[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37, the NFHS states that this brief has not been authored in whole or in part by counsel for a party to this case. The brief was instead authored by outside counsel for the NFHS. The NFHS further states that no person or entity other than the NFHS made a monetary contribution to the preparation or submission of this brief. Although petitioner MHSAA is a member of the NFHS, and has paid the standard annual membership dues, it has not made any specific financial contribution to this brief's preparation or submission.

The NFHS's mission and objectives give it a significant interest in successfully implementing separate-gender athletic programs in American high schools. Separate programs are essential to meaningful and rewarding participation for both genders. The Sixth Circuit's decision in this case would complicate the operation of separate programs by making even routine decisions presumptively unconstitutional. The Court should grant certiorari to address the Sixth Circuit's erroneous equal-protection analysis, which the NFHS believes will harm interscholastic athletics.

SUMMARY OF ARGUMENT

The Court should grant certiorari to address the wisdom of the Sixth Circuit's decision to subject the MHSAA's athletic scheduling determinations to heightened scrutiny. Although demanding that administrators advance an "exceedingly persuasive justification" for their conduct might initially appear to promote gender-equity in high school athletics, the NFHS believes it may well have the opposite effect. Routine implementing decisions that are not facially discriminatory should not be subjected to strict scrutiny. Educators already face a heavy burden as they strive to allocate scarce resources between genders. The goals of separate-gender athletics would be better served by requiring those who would challenge such allocation decisions to show discriminatory intent or overall inequality to establish a constitutional violation. At a minimum, administrators should not have to defend such routine decisionmaking by satisfying the "exceedingly persuasive justification" burden of *United States v. Virginia*, 518 U.S. 515 (1996) ("*VMI*").

ARGUMENT

The NFHS fully embraces Title IX, and seeks to promote, to the fullest practicable extent, equality in high school athletics. The NFHS wants to encourage sports participation for both girls and boys. The judgment below threatens to impede these efforts.

Notably, this case does not involve a challenge to the threshold decision to have separate athletic teams for boys and girls at the high school level. Respondents, like society in general, recognize and accept the benefits of separating sports by gender. Respondents' attack is instead directed at one of the many specific decisions that become necessary once the initial decision is made to conduct separate sports for high school boys and girls. The Sixth Circuit's decision below to make all these routine implementing decisions subject to heightened scrutiny[2] may well lead to unintended consequences.

The Sixth Circuit's application of the heightened scrutiny standard established in *VMI* would automatically, and the NFHS believes unfairly, subject everyday discretionary decisions to a presumption of intentional discrimination. This presumption will encourage challenges to, and unwarranted second-guessing of, every routine decision made to implement the different programs. Educators and officials will be saddled with the knowledge that every seemingly innocent decision they make will require an "exceedingly persuasive justification[,]" *VMI*, 518 U.S. at 531, and that mere "reasonableness" will not suffice.

---

[2] *See Communities for Equity v. Michigan High School Athletic Ass'n*, 459 F.3d 676, 694 (6th Cir. 2006).

Once the threshold decision has been made to establish separate athletic programs for boys and girls, many implementing decisions become necessary. For example, high school administrators often have limited resources to allocate between girls' and boys' programs, and must decide which seasons are most appropriate for each sport, taking into account the real need in many circumstances to share coaches and facilities, as well as the wishes of the participants themselves and their families. Even when a determination is made that sharing the same season is feasible, countless routine scheduling decisions become necessary, decisions that plainly cannot satisfy every constituency. Scheduling boys' games during the day, and girls' at night, or vice versa, may offend either or both genders. The Sixth Circuit, in fact, simply characterized *all* the scheduling decisions made by the MHSAA for girls' sports as "disadvantageous," 459 F.3d at 693, despite record evidence that many girls and their families preferred the chosen seasons. *See* Pet. at 6-10. How as a practical matter will every one of these decisions be subjected to a "heightened scrutiny" standard?

Educators must make more than just scheduling decisions. There traditionally has been a perceived need, based on gender differences, to modify the rules in some sports in which both boys and girls participate. The NFHS publishes such rules, and they have been adopted by almost all state high school associations. The rules provide for a smaller-circumference basketball for girls and a lower net height for volleyball. In track and field, there are height and spacing differences for girls' hurdling events. The girls' javelin is shorter and lighter. Girls are given shorter distances in the long-jump and triple jump to reach the pit. Body checking, which is allowed in boys' ice hockey, is prohibited in the girls' sport. Reasonable people can argue that many of these distinctions between boys' and girls' sports should be

modified, or even eliminated entirely. The logical extension of the Sixth Circuit's approach, however, would be to treat each of these rules differences as a "facial classification," thereby subjecting them to heightened scrutiny and demanding "an exceedingly persuasive justification" to support them. This cannot be constitutionally necessary.

From a practical standpoint, these sorts of implementing decisions by educators should not be viewed so skeptically. In the NFHS's experience, the vast majority of high school educators make their decisions with the proper allocation of resources and gender-equality in mind. Because virtually any decision can be said to favor either boys or girls, imposing a presumption of discrimination will only make it more difficult to allocate scarce resources fairly. The Court should recognize these decisions for what they almost always are – discretionary determinations made in good faith by educators to promote competitive opportunities for both genders.

The NFHS believes that facially-neutral implementing decisions, like the MHSAA's scheduling decisions at issue here, should not require the "exceedingly persuasive justification" of *VMI*. Once the decision is made (and accepted) to conduct separate sports by gender, decisions necessary to implement that separation should no longer be considered facial classifications calling for heightened scrutiny. Such decisions might more appropriately be candidates for "rational basis" review, *see, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985), or for some intermediate standard that does not require the "exceptionally persuasive justification" required by the

decision below.[3] Regardless of which test is applied, however, the Sixth Circuit's approach seems clearly unworkable as a practical matter. The Court should grant certiorari to consider whether the application of *VMI's* heightened scrutiny standard to everyday implementing decisions best serves the needs of an already burdened system or promotes the goals of separate-gender sports.

CONCLUSION

For the foregoing reasons, as well as those in petitioner's brief, the petition for writ of certiorari should be granted.

---

[3] *See, e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying test in gender discrimination setting that looked simply to whether challenged classification served "important governmental objectives" and was "substantially related to achievement of those objectives"). Although the Court in *VMI* ostensibly subjected Virginia's facial classifications to intermediate scrutiny, the Court's insistence that Virginia not only satisfy the substantial relationship test, 518 U.S. at 524, but that it also advance "an exceedingly persuasive justification" for the classification, *id.* at 532-33, has arguably clouded the appropriate test and increased the burden necessary to justify a defendant's actions. *See VMI*, 518 U.S. at 559 (Rehnquist, J., concurring) ("It is unfortunate that the Court thereby introduces an element of uncertainty respecting the appropriate test."); *see also id.* at 571-72 (Scalia, J., dissenting).

Respectfully submitted,

WILLIAM E. QUIRK
Counsel of Record
Aaron M. House
SHUGHART, THOMSON &
KILROY, P.C.
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105
(816) 421-3355

Attorneys for Amicus Curiae

February 28, 2007